No. 22,479

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

CALVIN J. SMITH,

Appellant,

vs.

E. L. CORD, Individually, E. L. Cord, doing business as Los Angeles Broadcasting Company,

Appellees.

On Appeal From the United States District Court for the Central District of California.

APPELLEE'S BRIEF.

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APPELLEE'S BRIEF.

I.

Jurisdiction.

Appellee agrees with Appellant's jurisdictional statement (A.O.B. 1, 2). However, Appellant has apparently made a typographical or printer's error in the amount of claimed damages. Claimed damages was $3,000,000, plus $3,000,000 exemplary damages, not Three Billion Dollars.

Appellee agrees that Appellant has the right to appeal from the order in question.

II.

Appellee's Supplemental Statement of the Case.

(The following will not repeat Appellant's statement of the case, but will merely supplement the same.)

The manner in which the question of disqualification of George O. West arose:

The mandate of the Court of Appeals was duly spread on the records of the United States District Court by Judge Ferguson on April 24, 1967 [C. T. 115]. The following day Appellee through his attorneys filed with the District Court a notice of motion to change venue and transfer the cause to the District of Nevada [C. T. 115]. This motion came on for hearing before Judge Ferguson on May 15, 1967 [C. T. 115]. On that date, George O. West appeared as attorney for plaintiff Smith and requested a continuance [C T. 115]. It had come to the attention of Appellee Cord and his attorneys that George O. West was an office associate of the disqualified attorney Lyndol L. Young and that he and Mr. Young had signed a joint lease for office space in the Mobil Building in downtown Los Angeles, and further, that throughout the proceedings before the Court of Appeals on the motion to clarify mandate, Mr. Young had been conferring with Mr. Smith and that Mr. Young had prepared affidavits for Mr. Smith to sign. Mr. Young and Mr. West thus appeared to have been collaborating. Hence, when Mr. West requested a continuance on the motion to transfer the cause to Nevada, attorneys for Appellee Cord advised Judge Ferguson that there was a serious question whether Mr. West was also disqualified under the mandate of the Court of Appeals from representing plaintiff Smith (Appendix, p. 2).

Judge Ferguson requested Appellee Cord and his attorneys to file a motion to disqualify Mr. West (Appendix, p. 3). Such a notice of motion to require com-

pliance with mandate and motion to disqualify Mr. West was prepared, and filed July 24, 1967 [C. T. 14]. Appellee requested the court for the following orders:

1. An order requiring plaintiff Calvin J. Smith to comply with the mandate of the United States Court of Appeals in this matter, in its proceedings No. 19,-416 dated November 4, 1964, reported in 338 F. 2d 516, which mandate was ordered spread in this case by the Honorable Thurmond Clarke, on April 26, 1965, and which mandate was thereafter spread a second time on the order of the Honorable Francis C. Whelan on May 5, 1965, and to comply with the mandate of the United States Court of Appeals in its No. 19,416 dated December 15, 1966, 370 F. 2d 418, and which mandate was spread by the Honorable Warren J Ferguson in this action on April 24, 1967.

2. For an order declaring whether George O. West, Esq. the present attorney of record for plaintiff Calvin J. Smith is qualified or not to represent plaintiff Calvin J. Smith in this action.

3. An order declaring whether or not Calvin J. Smith and George O. West, Esq. or either of them, are in violation of the mandates above referred to [C. T. 14, 15].

Said notice of motion was supported by the affidavit of Milo V. Olson, dated July 18, 1967, to which were attached. 10 Exhibits [C. T. 16-73a]. It should be noted that Exhibit 9 attached to the original affidavit was marked as a letter of Lyndol L. Young to Milo V. Olson dated January 20, 1966. Also, referred to as Exhibit 9 is the *brief cover on* the *Yax* case; however, at the time of the hearing

before Judge Ferguson, this Exhibit number was corrected to make it Exhibit 10 [R. T. p. 4, line 16, to p. 5, line 3]. (Ex. 10 is copied in Appendix p. 4).

George O. West filed an affidavit in opposition to said motion to disqualify him, and said affidavit is 6 pages long [C. T. 91a-91o]. However, the said affidavit does not in substance deny any of the factual matters upon which his disqualification was based.

Appellant Smith also filed an affidavit in opposition to the motion to disqualify Mr. West, which affidavit is dated July 28, 1967 [C. T. 117, 118]. In substance, appellant Smith said he had read the notice of motion to require compliance with mandate and motion to disqualify Mr. West, and then stated,

> "3. I have in all respects complied with the mandate of the United States Court of Appeals in this matter. 4. I want to get to trial in this matter because there is no meritorious defense to my action, and all of these motions merely delay my trial." [C. T. 117, 118].

Thus, Appellant Smith did not produce any evidence in opposition to the facts supporting the disqualification of Mr. West, nor was there any denial of said facts by the affidavit of Appellant Smith. The statement that appellant had complied with the mandate is nothing but a legal conclusion.

Because Mr. West's affidavit (and Appellant's Brief, pp. 6, 7) had raised some question as to how the opinion of the American Bar Association had been obtained, Milo V. Olson filed a reply affidavit which sets forth all of the facts relating to his correspondence with the American Bar Association [C. T. 81-87].

In addition to the affidavits above mentioned, the court was requested to and did take judicial notice of the entire files and records of this action. This request was made by Appellee not only in the notice of motion above quoted, but also in the affidavit of Milo V. Olson [C. T. 24, lines 14-17].

On August 7, 1967, the motion to disqualify came on for hearing before the Honorable Warren J. Ferguson, and was heard at the same time as appellee by his attorneys made the motion to transfer the cause for trial to another district [R. T. of August 7, 1967, p. 4, lines 4-13]. The motion to disqualify Mr. West was first argued [R. T. 4-21].

Judge Ferguson had the following undisputed facts before him in support of his findings and order: The fact that Mr. West is an office associate of Mr. Young was undenied, and the fact that they had a joint lease at the Mobil Building was undenied [C. T. 24]. The preparation of the affidavits by Mr. Young for the signature of Appellant was undenied [C. T. 18-19]. A joint response, motions and points and authorities were filed by Appellant Smith and his attorney Mr. West in collaboration with Mr. Young, his disqualified attorney in opposition to Appellee's motion for clarification of the mandate of this Court, reported at 338 F. 2d 516 [C. T. 32-48]. There was no explanation on the part of Mr. West as to how Mr. Young obtained copies of letters Mr. Olson had sent to Mr. West [C. T. 17]. There was no denial that Mr. Young had recommended Mr. West to Appellant Smith [C. T. 24]. There was no denial by either Mr. West or Mr. Smith that Appellant Smith saw Mr. Young several times a week after Mr. West had been

retained as his attorney, and Mr. Young prohibited from assisting Appellant [C. T. 24]. There was no denial of any of the essential facts resulting in the disqualification.

Mr. West argued in substance that the hearing on the clarification of mandate before the United States Court of Appeals, reported in 370 F. 2d 418, in the case of *Cord v. Smith,* was *res judicata* [R. T. p. 9, line 23; p. 11, lines 2-9; p. 12, lines 10-13]. Mr. West also argued that reference to the testimony given by Appellant Smith before the State Bar was improper [R. T. p. 12, lines 2-10]. Mr. West further argued that there was no fiduciary relationship between him and Mr. Young, although he did not deny that he and Mr. Young were office associates [R. T. p. 17, lines 4-11].

There was a duty on the attorneys for Appellee Cord, to advise Judge Ferguson that there had been a violation of the court order, even though such information came as a result of testimony heard on a preliminary investigation being held by the State Bar (Canons of American Bar Association, No. 29). This is commented on in Reporter's Transcript, page 7, lines 6-21.

Although Appellant complains (A.O.B. 5) that the District Court erred in denying Appellant a hearing and did not give him sufficient time to prepare and present witnesses and other evidence pertinent thereto, the record shows that objection to be but a "dismal wail!"

As early as May 15, 1967, Appellant Smith and his attorney George O. West knew that a motion was going to be filed to order the disqualification of

George O. West as an attorney for Appellant Smith (Appendix, p. 3). Said motion to disqualify was served and filed on July 24, 1967, and the hearing thereon, as above stated, was held on August 7, 1967 [C. T. 115]. Appellant concedes that such a motion is proper procedure to determine disqualification of an attorney (A.O.B. p. 15). And, notwithstanding that Appellee's motion stated it was based upon the notice, the files and records of the action and the affidavits filed in support thereof [C. T. 15], the *only* evidence adduced by Appellant was the affidavits of George O. West and Calvin J. Smith above referred to [C. T. 91a-o, 117, 118].

On August 7, 1967, the matter was submitted, and at no time from August 7, 1967, until September 26, 1967, did Appellant or his attorney George O. West present any additional data in the form of evidence of any kind, by motion, affidavit, or otherwise, for the court to consider, nor was there any offer of proof made on behalf of Appellant or by George O. West as to what the other evidence, if any, would consist of, and after the order was made on September 26, 1967, disqualifying Mr. West [C. T. 92-94], no application or motion was made to reopen the matter for the purpose of adducing any additional evidence, and the next thing Calvin J. Smith and his attorney George O. West did was to file a notice of appeal [C. T. 100].

In essence, therefore, the facts upon which the order was made disqualifying George O. West as attorney for Appellant Smith stand undisputed. It is significant also that nowhere in Appellant's Brief was any statement or suggestion made as to what additional evidence there was or could be produced on behalf of Appellant.

There is complete lack of merit to Appellant's second specification of error (A.O.B. p. 5).

Thus, the appeal for all practical purposes, is based on undisputed facts, and it is a question of law whether those facts support the disqualification of George O West as attorney for Appellant Smith in this case.

III.

Appellee's Responding Argument.

A. The Undisputed Evidence Fully Supported the Order Disqualifying George O. West as Attorney for Plaintiff Smith. (All emphasis is added.)

The statement made on page 6 of Appellant's Opening Brief that the only evidence presented to the District Court in support of the motion for disqualification was contained in the affidavit and reply affidavit of Milo V. Olson, attorney for Appellee [C. T. 16-36, 81-87], is not entirely accurate. In addition to the data contained in the affidavits and Exhibits attached thereto, the court was asked to and did take judicial notice of all the files and records of this action. Further, of course, the court took notice of the fact that the affidavits filed on behalf of Appellant, that is, Appellant Smith's affidavit [C. T. 117, 118] and the affidavit of George O. West [C. T. 91a-o] did not dispute nor deny the factual matters contained in the affidavit of Milo V. Olson [C. T. 16-73a] and as disclosed by the record of this case.

Appellee will not argue whether the court ruled that attorney West did not have the right to represent Smith or whether the court held that Smith did not have the right to retain West. The fact is, George O. West is disqualified to represent Appellant (plaintiff Smith) in this case.

The first mandate of this court reported in 338 F. 2d 516, page 526, directed the trial court to order that:

> "Lyndol L. Young, Esq. shall not at any time, directly or indirectly, and whether as attorney of record or not, represent, counsel or advise plaintiff Calvin J. Smith in connection with said action." (Said action being the case of *Smith v. Cord*, No. 64-288-WJF. in the United States District Court, Central District of California, at Los Angeles.)

Said mandate was ordered spread not only by Judge Thurmond Clarke on April 26, 1965 [C. T. 115] but was ordered spread a second time by Judge Whelan on May 5, 1965 (370 F. 2d 418, 420). On that occasion, appellant Smith was in the courtroom. Thus, there is no question that appellant knew that the court had ordered that Mr. Young was no longer, directly or indirectly, whether as attorney of record or not, to represent, counsel or advise him.

Notwithstanding this, the facts are undisputed that although Appellant purportedly retained George O. West as his attorney in the place of his disqualified attorney Young, Appellant participated in a program purporting to claim that Mr. Young, his disqualified attorney, could still participate in the case as a 50% assignee of his claim; Appellant permitted Mr. Young to accompany him and Mr. West to the deposition of Appellant, and his attorney Mr. West refused to request Mr. Young to leave so the deposition could proceed (370 F. 2d 418, 420), and then, after the clarification of mandate proceedings were filed in the United States Court of Appeals, Appellant signed affidavits prepared for him by Lyndol L. Young [see Exhibit

5 to affidavit of Milo V. Olson, C. T. 18, 19, 50-58]; and further, on September 30, 1965, Appellant Smith signed another affidavit [C. T. 60] which was obviously prepared by Mr. Young because the affidavit of service by mail shows it was even served by mail on his own attorney George O. West [C. T. 64].

George O. West, at this time, although purporting to be attorney for Appellant Smith, was permitting Mr. Young to prepare such affidavits on behalf of Appellant [C. T. 18, 19], and Mr. West joined in briefs and the other motions prepared by Mr. Young filed in the motion to clarify mandate proceedings before the Court of Appeals, wherein they requested that the Court of Appeals panel of judges be disqualified; that the matter be heard en banc; that the prior opinion be vacated, etc.; and the record shows convincingly that Appellant and Mr. West joined in such documentation and such motions [C. T. 32-48].

Respecting conferences relating to a possible settlement held with Mr. West, Mr. West permitted Mr. Young to reply to correspondence in that regard [C. T. 71, 72]. A letter written to George O. West by Mr. Cord's attorneys dated January 3, 1967 [Ex. 7 to Olson affidavit, C. T. 66, 67] was replied to by correspondence from Mr. Young in the form of a letter dated January 20, 1966 [C. T. 71, 72].

Mr. West accompanied Mr. Young before a subcommittee of the United States Senate, presided over by Senator Tydings of Maryland [C. T. 23]. It is

undisputed that Mr. West and Mr. Young occupied offices together at 315 West Ninth Street, Suite 900, Los Angeles and had the same telephone number [C. T. 23, 24], and it is undisputed that Mr. Young and Mr. West jointly signed a lease as lessees for Suite 650 at the Mobil Building, 612 South Flower Street, in Los Angeles, which lease will not expire until October of 1971 [C. T. 24]. There is no denial of these facts, nor did Appellant or Mr. West deny that Appellant Smith called on Mr. Young several times a week after Mr. West had been retained, and Appellant Smith even had testified that he had retained Mr. West at the suggestion of Mr. Young, his disqualified attorney [C. T. 24].

While Mr. West and Appellant quibble at page 9 of Appellant's Opening Brief as follows:

> "Olson's affidavit does not reveal whether West transmitted Olson's letter to Young, or whether, which is equally possible, West told Smith and Smith told Young,"

it is still quite apparent that under those circumstances, Mr. West knows best how Olson's letter got to Mr. Young that was sent to Mr. West. This could easily have been settled by either Mr. West or by Appellant Smith in their affidavits, but they did not see fit to do so. In any event, if Mr. West transmitted Olson's letter to Mr. Young, that is collaboration that is prohibited under the mandate, and if Appellant conferred with Mr. Young, this likewise "flys in the teeth" of the mandates in this case.

While the foregoing is not all of the evidence, as the court was entitled to make reasonable inferences from such facts, it is quite clear that the foregoing was sufficient support for the court's finding

> "that the relationship between Attorney Young and Attorney West is so close that to permit Attorney West to proceed as Smith's attorney would violate the mandates. Not only are West and Young office associates, jointly leasing office space, but Attorney Young replies to correspondence involving the lawsuit." [C. T. 93].

A further finding was made that on September 30, 1965, when West was an attorney of record for Appellant Smith, Mr. Smith signed an affidavit, where service by mail was made upon Cord's attorneys, and by such

> "affidavit of service by mail, it was certified that a copy of the affidavit was also served on Mr. West. It is not known who prepared the affidavit, but the inference is clear that it was not done by Mr. West." [C. T. 93, 94].

The court concluded:

> "The totality of the circumstances have led this court to the conclusion that Mr. West simply cannot represent Smith without 'assistance by consultation or advice' from Mr. Young. Such assistance has been given in the past and there is no reason to believe it will cease in the future." [C. T. 94].

The *undisputed evidence supports* the *foregoing finding and conclusion,* and supports the order that

> "The motion of defendant to disqualify George O. West, Esq. as attorney for the plaintiff Smith is granted." [C. T. 95].

Judge Ferguson further ordered that

> "All proceedings are stayed until such time as the *plaintiff obtains counsel who will not and cannot be influenced or advised* in any degree by *Lyndol L. Young, Esq.*" [C. T. 95].

The record of this case shows that Mr. West and Appellant Smith in the past have not complied the conditions of said order nor with the mandates.

Under Rule 52(a) of the Rules of Civil Procedure, the findings just referred to should not be set aside *unless clearly erroneous,* and in view of the record in this case, said findings and conclusion are not "clearly erroneous". As this was an order made *on a motion,* findings of fact and conclusions of law were unnecessary (under Rule 52); nevertheless, the court did in fact make findings and conclusions of law, and made an order thereon disqualifying appellant's attorney, Mr. George O. West.

The following cases hold that unless the findings are "clearly erroneous", the appeal court is bound by them.

Kamen & Co. v. Paul H. Aschkar & Co., 382 F. 2d 689 (Calif. 1967);

Ventura County v. Blackburn, 362 F. 2d 515 (Calif. 1966);

Beaver v. United States, 350 F. 2d 4 (Calif. 1965);

Chichester v. Golden, 321 F. 2d 250 (Calif. 1963).

The court is entitled to view not only the evidentiary facts that are undisputed, but also to draw factual inferences that reasonably may be drawn from undisputed facts.

See:

Truck Terminals, Inc. v. C.I.R., 314 F. 2d 449 (Calif. 1963);

American Pipe and Steel Corp. v. Firestone Tire and Rubber Co., 292 F. 2d 640 (Calif. 1961).

"Clearly erroneous" means that although the evidence supports the finding, the reviewing court on the entire evidence is left with a definite and firm conviction that a mistake has been committed.

Admiral Towing Co. v. Woolen, 290 F. 2d 641 (Calif. 1961).

It is submitted, however, that such a firm conviction that a mistake has been committed would hardly be possible from the undisputed evidence and reasonable inferences that may be drawn therefrom in this matter.

The Court of Appeals, of course, may take judicial notice of its own record, and not only did the District Court do so but the Court of Appeals is requested to do so in this case.

See:

Thomas v. United States, 376 F. 2d 564;

Kamsler v. M.I.F. Corp., 359 F. 2d 752.

All of the foregoing establishes that there is no merit to Appellant's first specification of error (A.O.B. p. 5).

B. Two Lawyers Who Share Offices, Though Not Partners, Bear Such a Close Relation to One Another as to Bring Canon 6 (Canons of the American Bar Association) Into Play. See Bound Volume of Official Opinions of the American Bar Association, Appendix A, Decision No. 284.

The Report prepared by the Ethics-Conflicts of Interest Panel of the 1965 (California) State Bar Convention discussed "the thorny problems facing the lawyer when conflicts of interest arise between attorney and client." This Report was printed in the Los Angeles Daily Journal, Report Section, of October 26, 1965, commencing at page 11. The American Bar Association opinion (No. 284) is set forth on page 13 thereof.

This Report caused counsel for Appellee to request an opinion from the American Bar Association's Standing Committee on Professional Ethics. Said Committee of the American Bar Association reported:

> "If, however, your question is rephrased to inquire whether a lawyer sharing offices with another is precluded ethically from representing a client whom the other lawyer cannot represent, then the answer appears clear. Canon 6 specifically prohibits the representation of conflicting interests. In Formal Opinion 33, this committee held that this canon would prohibit a partner from representing a client whom another member of the part-

nership could not ethically represent. In Informal Decision 284 we held:

'Two lawyers who share offices, although not partners, bear such close relation to one another as to bring Canon 6 into play.'

"To the same effect are Formal Opinion 104, Informal Opinion 855, and Drinker, 'Legal Ethics', page 106.

"These opinions and decisions appear to apply directly to the situation regarding which you inquire. We, therefore, hold that regardless whether or not under the circumstances which you describe a lawyer who shares office space with another lawyer who is disqualified from representing a client is likewise disqualified from representing that client, he may not ethically do so."

A full copy of the A.B.A. opinion so received dated July 1, 1967 is part of the record [C. T. 79-80].

In *Drinker* on Legal Ethics, page 106, it is said:

"The injunction not to represent conflicting interests applies equally to law partners—, *also to lawyers, not partners, having offices together.*"

Citing following footnote:

"A.B.A. op. # 104; App. A, 284; Mich. 100; see also N.Y. City 386 (the lawyer must be above suspicion). In N.Y. City 105, that Committee said:

"When attorneys occupy offices together, they have a mutual relation of trust and confidence—." *Cf.* N.Y. City B. 205.

Not only have Mr. West and Mr. Young worked closely together on this specific case, but in addition thereto, at least since August 10, 1966, they have shared offices together, first at 315 West Ninth Street, Suite 800, Los Angeles, California, 90015, and since January 5, 1967 (if not sooner), they have shared offices in Suite 650 at 612 South Flower Street, Los Angeles, California, 90017.

Mr. West is thus disqualified not only by his active participation and collaboration with Mr. Young, but also *because they are office associates* which Mr. West and appellant admit (A.O.B. 11, 16). Apparently they will be sharing offices for some time to come (until 1971) as they signed a lease together [C. T. 24].

The authorities that relate to the circumstances that lawyers representing conflicting interests may not form a partnership except by dropping out of both sides of the cases (American Bar Association, Opinion No. C-437) are applicable here, as well as the rule that an attorney who is with a firm that has in the past participated in litigation through which he could have gained certain information not otherwise available, should not undertake representation of another related party in subsequent litigation where such information might be material (American Bar Association Ethics Committee Opinion, C. 493).

See:

T. C. Theatres Corp. v. Warner Bros. Pictures, Inc., 113 F. Supp. 265;

Brown v. Miller, 286 Fed. 994;

United States v. Bishop, 90 F. 2d 65, at 66;

In re Boone, 83 Fed. 994;

Wutchumna Water Co. v. Bailey, 216 Cal. 564, at 571;

Lasky Bros. v. Warner Bros., 130 F. Supp. 514;

Weidekind v. Tuolumne County Water Co., 74 Cal. 386.

In this case, we need go no further than the rule which is the law of this case as set forth in *Cord v. Smith,* 338 F. 2d 516, and 370 F. 2d 418.

C. The Mandate of 338 F. 2d 516, 526 Was in Effect, and There Is No Justification for the Conduct of Appellant Smith, Mr. Young and Mr. West in Defiance Thereof, Because of Proceedings That Took Place on the Clarification of Mandate Matter.

It appears to be Appellant's contention that the mandate of this court made on November 4, 1964 (338 F. 2d 516, at 526) was inoperative after it was ordered spread on April 26, 1965, and again on May 5, 1965. The Court of Appeals clearly indicated that any such contention of Appellant and Mr. West is not so when in its opinion at 370 F. 2d 418, it said, in referring to Mr. Young and Appellant (p. 424):

> "And, he may not, *as we indicated in our prior opinion, assist Smith or his attorney by consultation or advice.*"

It is precisely this that Mr. West, Appellant Smith and Mr. Young continued to do after the mandate of 338 F. 2d 516 was spread. Just because Mr. Young claimed he was a 50% assignee of Mr. Smith, that did not operate to make the final order and mandate no longer effective. That absurd argument in effect is made by Mr. West and Appellant as justification for their conduct in violating the mandate.

D. Appellant and His Attorney West Had a Duty and Obligation to Disclose to the Court at the Outset the Relationship Not Only Between Appellant and Young, but Also Between West and Young.

The first time Mr. West appeared before the Court of Appeals at the oral argument on motion to clarify mandate on June 2, 1966, Mr. West should have disclosed to the Court of Appeals that although he purportedly represented Mr. Smith, he still permitted Mr. Smith to confer with Mr. Young, and that Mr. Young had in fact prepared affidavits for Mr. Smith to sign.

Further, at the first appearance Mr. West made before Judge Ferguson, Mr. West should have disclosed to the court that he and Mr. Young shared offices (Appendix pp. 1-3), instead of putting the burden on Appellee and his attorneys to bring this to the court's attention.

Canon 22 of the American Bar Association, first sentence thereof, provides: "The conduct of a lawyer before the Court, and with other lawyers, should be characterized by candor and fairness."

Particularly in view of the mandate of this Court and the orders that had been made disqualifying Appellant's former attorney Mr. Young, there was a peculiar duty on Mr. West to be fair and candid with the court. This negative action on the part of Appellant and his attorney Mr. West comes within the prohibition of the last sentence of Canon 22 of the American Bar Association which provides: "These and all kindred practices are unprofessional and unworthy of an officer of the law charged, as is the lawyer, with the duty of aiding in the administration of justice."

For example, the case of *Daily v. Superior Court,* 4 Cal. App. 2d 127, at 131, states:

> " 'Deceit may be *negative* as well as affirmative; *it may consist in suppression of that which it is one's duty to declare,* as well as in the declaration of that which is false.' "

Daily v. Superior Court, supra, also refers to the *Matter of Shay,* 160 Cal. 399, at page 406, where Mr. Justice Shaw, speaking for the court said:

> " 'The persons here named are all persons engaged in the service of the court, assisting it in the exercise of its jurisdiction, and in the performance of its functions. They are actually, or potentially officers of the court. They stand in confidential relations toward the court, and in consequence thereof they owe to the court the duty of greater fidelity and respect than are due from other persons.' "

See also:

> *Vaughn v. Municipal Court,* 252 A.C.A. 376, at 385.

In *Grove v. State Bar,* 63 Cal. 2d 312 at 315, the court there said:

> "Petitioner contends that the failure to convey to Mr. Coleman's request for a continuance does not constitute misleading 'the judge or any judicial officer by an artifice or false statement of fact or law.' (Bus. & Prof. Code, §6068, subd. (d).) There is no merit to this contention. The concealment of a request for a continuance misleads the judge as effectively as a false statement that there was no request. *No distinction can*

therefore be drawn among concealment, half-truth and false statement of fact. (See *Green v. State Bar,* 213 Cal. 403, 405 [2 P.2d 340].)"

In view of the foregoing rules and the Canons of the American Bar Association, and the Rules of Professional Conduct that are applicable here, and the orders and mandates made in this case, it is submitted that Appellant and Mr. West have not only failed to comply with the orders of the court, but that Mr. West has not complied with the duties he owed the court as an attorney, and by the Brief that he has prepared and filed herein, he insists in effect that he and Appellant are not required to comply with the Rules of Professional Conduct, or with the mandates of this Court.

E. As Above Set Forth, Judge Ferguson Found by His Order That Appellant Had Failed to Comply With Orders of the Court, and Stated:

"The totality of the circumstances have led this court to the conclusion that Mr. West simply cannot represent Smith without 'assistance by consultation or advice' from Mr. Young. *Such assistance has been given in the past and there is no reason to believe that it will cease in the future.*" [C. T. 94].

One clear indication that such assistance will not cease is evidenced by Appellant's present appeal. To permit Mr. Young's office associate to now counsel Appellant, falls within the statement used by this Court in 370 F. 2d 418, at 424, "This is too easy a way to avoid the disqualification."

Judge Ferguson went on to state that, "The mandates could be enforced by contempt proceedings, but

that will be small solace to Cord." [C. T. 94]. Thus, Judge Ferguson made no order of contempt, nor did he on his own motion make an order dismissing the action, notwithstanding Appellant's persistent refusal to comply with the court orders, and the court's findings thereon.

The undisputed evidence fully sustains the order appealed from.

Conclusion.

The order of disqualification of George O. West, as Appellant's attorney, and the order staying the proceedings should be affirmed.

Most respectfully submitted,

MILO V. OLSON,
WILLIAM K. WOODBURN and
EDWARD D. NEUHOFF,
By MILO V. OLSON,
Attorneys for Appellee Cord.

Certificate.

I certify that in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit and that, in my opinion, the foregoing brief is in full compliance with those rules.

MILO V. OLSON

APPENDIX.

Pages 1-3 Transcript of May 15, 1967 Hearing before Judge Ferguson.

Page 4 Exhibit 10 to Olson Affidavit—Cover of Petition in re *Clarke v. Yax*.

Los Angeles, California, Monday, May 15, 1967, 10:00 A. M.

(Other court matters.)

The Court: Mr. Murphy.

The Clerk: No. 6 on the calendar, Case No. 64-288-F, Calvin J. Smith v. E. L. Cord, et al., hearing plaintiff's motion to continue defendant's motion for change of venue and defendant's motion to change venue to District of Nevada.

Mr. Olson: Milo V. Olson, ready in this case for one of the moving parties.

Mr. West: May it please the court, George O. West for the plaintiff Smith.

The plaintiffs are moving to continue, we request that the matter be continued, if possible, for a period of at least 60 days, for the reasons set forth in my affidavit.

Although I am recovered from the injuries I suffered, I am now in the headache phase. I am not able to devote a full day, or even more than an hour or two, to my office. There are quite a few matters raised in the 22 pages that I was served with that we have to more or less set forth our case, the number of witnesses and so on. I just haven't had a chance to sit down with Mr. Smith to see who they are. So I can't be more specific, other than to say at this time that they are local witnesses.

The Court: Mr. Olson.

Mr. Olson: I will respond to the motion of Mr. West first, your Honor.

Your Honor, it might seem a little queer and odd that we didn't—

The Court: In view of the background of the case, Mr. Olson, you might need to explain a little.

Mr. Olson: Yes, your Honor.

There is a serious question—and this is embarrassing to me to bring this up because Mr. West's conduct with us has been gentlemanly, he has appeared to be making an attempt to conduct himself as a lawyer should—but there is a serious question of whether Mr. West, in representing Mr. Smith, is in violation of the mandate of this court. And I call this to your Honor's attention, so your Honor can do as your Honor sees fit in regard to the mandate at this point.

For example, Mr. West refused to agree that Mr. Young could not attend the deposition of Mr. Smith, after the Court of Appeals had ruled that Mr. Young was disqualified and could not, directly or indirectly, represent Mr. Smith. Mr. Young, Mr. West and Mr. Smith appeared together at the deposition.

In the proceedings before the Court of Appeals Mr. West permitted his client, Mr. Smith, to sign an affidavit that was specifically prepared by Mr. Young. Mr. West permitted himself to join in the points and authorities with Mr. Young.

When Mr. Young was appearing on his own behalf before the Court of Appeals, Mr. West joined Mr. Young in the motion to disqualify two members of the panel of the Court of Appeals. This was in August of 1965, I believe, or thereabouts.

Now, they are currently also associated in the Mobil Building at the corner of Sixth and Flower, Sixth Street and Flower.

Consequently, under those circumstances, as the Court of Appeals said, certainly Mr. Smith can find another lawyer, with the 25,000 lawyers there are in the

State of California, it is a coincidence that Mr. West now is Mr. Smith's attorney, under these circumstances, and is an office associate with Mr. Young.

I call that to your Honor's attention before we proceed further. That is one of the reasons we think, as far as a continuance is concerned, I think possibly there should be a continuance.

The Court: I don't think you need comment on it any further, Mr. Olson. I think the problem is serious enough that the motion for a change of venue should be continued.

And at the same time that I continue that motion the court would request that you file a motion setting forth in affidavit form the other matters concerning whether or not Mr. West can continue to represent Mr. Smith, so the court can hear both matters at the same time.

Mr. Olson: Very well.

The Court: This will take, I am sure will be most strongly opposed.

Now the 60 days will be during the time when we will be in our Judicial Conference of the Ninth Circuit, so I will continue the motion on change of venue to August 7th, and then at that time if you so desire, Mr. Olson, if you will set the matter for hearing on the same date.

Mr. Olson: Very well, your Honor.

The Court: Notice waived?

Mr. Olson: Notice waived.

The Court: Very well.

Mr. Olson: Thank you, your Honor.

(Other court matters.)

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IN THE

Supreme Court of the United States

October Term, 1966
No. 936

HONORABLE THURMOND CLARKE, Chief Judge, United States District Court, Central District of California,
Petitioner,

vs.

WILLIAM G. YAX,
Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

LYNDOL L. YOUNG,
612 South Flower Street,
Los Angeles, Calif. 90017,
Counsel for Petitioner.

Ex. #10

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